Victor Valley Heating and Air Conditioning and Concord Mechanical, Inc. and Sheet Metal Workers International Association Local 509. Case 31-CA-11947

29 September 1983

DECISION AND ORDER

By Chairman Dotson and Members ZIMMERMAN AND HUNTER

On 11 April 1983 Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, the Charging Party and the General Counsel filed exceptions and supporting briefs, and Respondent Victor Valley filed cross-exceptions and a brief in opposition to the exceptions and in support of the cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law

¹ The General Counsel and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III,D, of his Decision, the Administrative Law Judge found that Adrian DeZee made certain statements at an "NLRB hearing." However, it appears that these statements were made by DeZee at an arbitration hearing. This apparently inadvertent error does not affect our decision and is hereby corrected.

Additionally, the Administrative Law Judge, in fn. 17 of his Decision, states that only "trial testimony," as opposed to out-of-court statements, is considered. As it is clear that the Administrative Law Judge's findings are based on all the testimony presented, including the admissible testimony of witnesses concerning statements made by persons prior to the hearing, we do not rely on these comments of the Administrative Law Judge.

In finding that the layoff of employee Roney was not unlawful, the Administrative Law Judge noted that Roney was employed under a union contract with Respondent Victor Valley but that no grievance was filed concerning his layoff. The Administrative Law Judge noted that no finding or inference was based on this fact. We agree and do not base our determination that Roney was not unlawfully discharged on any inferences that may be drawn from this fact.

² As indicated, we affirm the Administrative Law Judge's conclusion that Respondent did not unlawfully lay off employee Larry Roney, and that it did not unlawfully threaten to do so. In this regard, we find it unnecessary to rely on the Administrative Law Judge's discrediting of the testimony of employee Edward Stevens about remarks assertedly made to him by Supervisor Gerrold Amack, Sr. Assuming, arguendo, the credibility of Stevens' testimony, we nevertheless find that it is insufficient to establish, or materially support an inference, that Respondent acted unlawfully in laying off Roney. Specifically, Stevens' testimony in this regard establishes only that Amack told Stevens (1) that Respondent's director and financial secretary, Jane DeZee, was "upset about something" that had happened a week prior, and (2) that "they" were going to discharge Roney. It is clear from an attentive reading of Stevens' testimony (and contrary to the Administrative Law Judge's incorrect reading of it) that Amack did not tell Stevens that DeZee had stated to Amack (or anyone else) that Roney was going to be discharged. All Judge, as consistent herewith, and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

that Stevens' testimony in this regard will support is a finding—of very limited probative value—that Amack perceived that DeZee was "upset about something," and that "they" were going to discharge Roney. Thus, even crediting, arguendo, Stevens' testimony, we find, unlike the Administrative Law Judge, that the case for unlawful layoff is not as strong as the case for legitimate layoff. Accordingly, in concluding that the General Counsel has failed to establish his allegations by a preponderance of the evidence, we find it unnecessary to rely on the Administrative Law Judge's discrediting of Stevens' testimony.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in San Bernardino, California, on February 1 and 2, 1983. The complaint, issued on April 22, 1983, is based on a charge¹ filed on March 1, 1982, by Sheet Metal Workers International Association Local 509 (the Union). The complaint alleges that Victor Valley Heating and Air Conditioning (Victor Valley) and Concord Mechanical, Inc. (Concord), as a single employer, joint employers, or alter egos, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondents.

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Victor Valley is, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of California with an office and principal place of business located in Hesperia, California, where it is engaged in fabricating sheet metal parts and in the installation of heating, airconditioning, ventilation, and related sheet metal parts at new residential, commercial, and industrial jobsites.

¹ The General Counsel's brief includes an agreement that the charge correctly was served on Concord by service on Victor Valley. Respondents' counsel's brief does not challenge or discuss the service on Victor Valley as binding Concord. No resolution of this matter is necessary in view of the conclusion, *infra*, that the two Companies are not joint employers, a single employer, or *alter egos* of each other.

Respondent Concord is, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of California with an office and principal place of business located in Apple Valley, California, where it is engaged in the installation of heating, air-conditioning, ventilation, and related sheet metal parts at new residential and commercial construction jobsites.

Respondent Victor Valley, in the course and conduct of its business operations, annually sells goods or services valued in excess of \$50,000 to the United States Department of Defense, and annually sells goods or services valued in excess of \$50,000, to customers or business enterprises within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standard.

It is found that Respondent Victor Valley is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers International Association Local 509 is, and at all times relevant herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background²

Adrian DeZee³ and his wife are the sole stockholders and directors of Victor Valley, which was organized in 1973. Adrian is the president and manager, does all estimating of jobs, does all buying and selling, and is Victor Valley's RMO.4 Jane DeZee is the financial secretary of Victor Valley, is the credit manager, and signs all checks for the Company. Jane formerly was active in the business, and at one time signed a collective-bargaining contract with the Union, but no longer is active on a day-today basis. Donna Benedict was a part-time (30 hours per week) secretary for Victor Valley for several years, and left her job there in January 1982. John DeZee worked for Victor Valley for several years prior to November 1981 after Concord was organized. Initially, he worked after school hours and during school breaks, but later worked full time for Victor Valley. Chris Geiger, Adrian's son-in-law, worked for Victor Valley as an apprentice sheet metal worker from 1978 until March or April 1981 when he discontinued working because of a back problem. Gerrold Amack, Sr., was a statutory supervisor of Victor Valley at times relevant herein.

Victor Valley has had a collective-bargaining agreement with the Union at all times relevant herein with the

current agreement being effective until July 31, 1984. Victor Valley does sheet metal work both in the shop as a fabricator and in the field as an installer. In addition, the Company has done some service work for individuals and companies. As of late 1980 and early 1981, Victor Valley's work almost entirely was on residential projects, and the Company had approximately 10 employees.5 Competition among heating and air-conditioning contractors in the area of Victor Valley's shop became intense beginning in 1980 partially because of the business recession at that time and partially because of the existence of nonunion firms whose labor costs were lower than those of union firms. In fiscal year 1980 Victor Valley lost approximately \$50,000, in 1981 it lost approximately \$103,000, and in 1982 it lost approximately \$111,000. In late 1980 or early 1981 Adrian decided to discontinue doing residential work, and to concentrate Victor Valley's efforts in commercial and industrial work.

Concord was organized on June 8, 1981, with John DeZee, who then was 20 years of age, as president and sole owner and with Jane DeZee, his mother, as corporate and office secretary. Jane was in the office infrequently primarily to sign checks for employee pay and corporate purchases. Benedict, who was a longtime family friend of the DeZees, in October 1981 set up the financial books of Concord and in early 1982 became its bookkeeper and secretary. Prior to early 1982 Benedict still was employed by Victor Valley, and kept Concord's books in her home without pay. Although he never has owned any stock of Concord or been one of its officers, Geiger was made Concord's superintendent and from the beginning of the business has run the Company. John's business experience and expertise as a tradesman is extremely limited, and he has only a rudimentary knowledge of business affairs. Geiger runs nearly all the jobs, does nearly all the estimating and bidding, does all the hiring and firing, gives all employee raises, and is, and always has been, the moving force behind the business, although he never has owned stock in, and never has been an officer of, Concord. Initially, only John and Geiger were employed by Concord with John running the few jobs he worked on. Concord's initial capital was \$4,500, which was contributed by John. Of that amount, \$2,500 was his own money and \$2,000 was a gift to him from his grandmother. Concord's initial equipment consisted of John's handtools, but some typewriters, a drafting board, some office equipment and furniture, and some small shop equipment later were obtained from Victor Valley, for which, John credibly testified as did Adrian and Benedict, Concord paid in cash.

When Concord was organized, and for several months thereafter, it had no office and no work. The first job was obtained approximately in November 1981,6 and Concord's work thereafter steadily increased. The work now is approximately 80 percent residential and 20 percent commercial, and is of the same type as the work

² This background summary is based on stipulations of counsel and on testimony and evidence not in dispute.

³ The three DeZees sometimes are referred to by their first names—Adrian, his wife, Jane, and their son, John. Other individuals are referred to by their last names.

to by their last names.

4 Governmental regulations require that all heating and air-conditioning businesses must be licensed by the state government and have an RMO or an RME employed by the businesses. An RMO is a responsible managing officer, and an RME is a responsible managing employee.

⁵ In 1977, 1978, and 1979 Victor Valley had approximately 18 employ-

ees.

6 The facts are not in dispute that John was on Victor Valley's payroll until November 1981, and that Victor Valley made payments to union trust funds for John until that time.

formerly done by Victor Valley. The only major difference between the work of Concord and of Victor Valley is that the former does not do fabricating while the latter does. Some of Concord's customers are referred to it by Victor Valley. The present shop is located a few buildings from, and near to, Victor Valley. The move into that shop was made approximately 4 months ago. Prior to that time Concord's work was conducted out of Sherry Kitchen's garage⁷ and yard and, later, out of John's home.

When John organized Concord he had no license, and, since a licensed individual was required by law, Adrian registered as Concord's RMO. That registration was not discontinued until April 1, 1982.8 At the present time Concord operates under the license of its employee Russell Wallace as its RME.

When Concord first began business, Geiger was doing nearly all the work and managing all of its daily business affairs. However, he had no experience in estimating or bidding jobs. Adrian taught him how to estimate and bid, and for the first few months came to Concord's workshop approximately once each week and assisted Geiger in learning those functions. Estimates and bids usually were submitted to customers over Gieger's signature, but on some occasions Adrian prepared and signed them for Concord.9 Adrian also gave Geiger the names of suppliers or material and equipment, and often gave him business advice. Geiger credibly estimated that Adrian and assisted him in the preparation of 20 or 30 bids and estimates, the last of which was approximately 8 or 9 months ago. Geiger estimated that the total of bids presented was 600 to 800. Geiger still seeks advice from Adrian, particularly on commercial jobs, approximately two times each month. The last such occasion was 1-1/2 to 2 months ago. Geiger credibly testified that he no longer needs assistance in bidding or estimating residential jobs.

B. Issues

The principal issues are whether or not Victor Valley and Concord are a single employer, joint employers, or alter egos; whether or not Victor Valley discharged its employee Larry Roney in violation of the Act; and whether or not Victor Valley made an unlawful statement to an employee.

C. The Present Relationship Between Victor Valley and Concord

Most of the facts relative to this relationship are not in dispute. Victor Valley is out of the residential business, and Concord specializes in residential business; through referrals from Victor Valley, Concord has "inherited" some residential business formerly done by Victor Valley, and on at least one occasion Adrian referred a commercial job10 to Concord. Geiger testified that

⁷ Sherry Kitchen is John's sister.

does some of that type of work.

10 This was a church job in Bakersfield.

Victor Valley regularly refers small commercial jobs to Concord. John testified that Concord never got any business through Victor Valley, but that testimony is contrary to the record, including the testimony of Gieger and Adrian, and is given no credence. Benedict credibly testified that Concord regularly advertises in a trade journal, and has obtained much business in that manner. Geiger actively solicits customers for Concord. Concord's employee complement has grown from 2 to 12 or 13; Victor Valley's has declined from approximately 18 to 4 or 5. Initially, Adrian visited Concord each week or so to assist Geiger and give advice to Geiger and John, but at the present he takes no active part in Concord, nor does he visit any jobsite or exercise any control or authority over Concord or any of its jobs. Adrian does not receive, nor has he ever received, money from Concord for the advice and training he gave to Geiger and John. Concord is a legal entity separate and apart from Victor Valley, and neither Adrian nor Jane ever has received any money for their services to Concord; neither owns any of Concord's stock. Jane is Concord's financial secretary and comes to Concord's office each week to sign checks, she assists in collecting accounts receivable, but she is not otherwise active in Concord's day-to-day affairs. Adrian is not on Concord's board of directors, but Jane is. Benedict has not done any work for Victor Valley since early 1982 when she left Victor Valley to go to work for Concord on a permanent basis. Terry Geiger, who is Christ Geiger's wife, works in Concord's office with Benedict.

At one time Adrian stated to a representative of the NLRB that he owned a 20-percent interest in Concord, but that interest is not shown in the corporate records. Adrian testified that he never paid any money, or gave any property, for such interest and that he thought the records were made to reflect that he was vice president of Concord, and held an interest in it, upon advice of counsel and because he believed that, in order for Concord to be lincensed, the RMO had to be an officer and owner of the corporation. Adrian was registered as Concord's RMO, as explained above. Adrian credibly testified that the corporate records never were changed to reflect any interest in him or his status as an officer of Concord. However, he stated that he filed an official disassociation from Concord as its RMO to remove any doubt concerning his status.

On two occasions in late 1981, at Adrian's request, Concord completed jobs that Victor Valley had started. The cost of completion of the two was approximately \$200 or \$300, but Victor Valley never reimbursed those costs to Concord, nor did Concord expect, or request, reimbursement. Adrian asked Concord to finish the jobs.

Concord does not do any of its own fabricating, but it uses much fabricated duct work.¹¹ Geiger credibly testified that all of Concord's prefabricated material is obtained from Victor Valley¹² without solicitation of bids

⁸ The charge herein was filed on March 1, 1982.

⁹ This statement is from Gieger's testimony. Bidding and estimating on small residential jobs is simple and largely a matter of form. Benedict does some of that type of work.

¹¹ Adrian credibly testified that there are many heating and air-conditioning businesses in the "Valley" that, like Concord, do installation work but do not do their own fabricating—their fabricated materials are obtained from shops that are equipped to fabricate material.

¹² John credibly testified that Concord picks up all material fabricated by Victor Valley, but all other material purchased from vendors is delivered to Concord by its sellers.

from other suppliers, and, further, that Victor Valley's invoices are paid as they are submitted without question. ¹³ Geiger testified that some materials are puchased from suppliers other than Victor Valley, but only because those materials are not handled by Victor Valley.

When Concord started getting business in November 1981, it leased three trucks and trailers from Victor Valley, and, as business increased, more of them were leased. The equipment was leased on a monthly basis, and payments were kept current with the exception of one or two occasions when Concord was in arrears for a short time in the maximum amount of \$600. At the present time all of Concord's rolling equipment of five or six trucks and trailers is on lease from Victor Valley, and the lease payments are current. Concord pays all maintenance for the trucks.

Concord does not have any fabricating equipment in its shop, but it does have a yard and shop adjacent to its office where it works on material to be installed. The only tools in the shop belong to Concord's employees. However, Concord has office equipment consisting of desks, calculators, furniture, and related items which it obtained from Victor Valley and for which it paid \$9,950.

In the past Victor Valley has done service work for individuals but not for companies, although it always has serviced its warranties for both individuals (residential) and companies. However, prior to March 1982 Victor Valley did not do any service work for companies other than for Concord, for whom it did provide such service on a contractual basis. Victor Valley no longer does any servicing business, and there is no evidence that Concord ever paid for services by Victor Valley on any basis other than in the regular course of business.

Concord has hired many employees since its inception, of which several had worked for Victor Valley at some time prior to being employed by Concord. However, Geiger credibly testified that he knew of only one employee, Richard Boucher, who was referred to Concord after being laid off by Victor Valley.

On one occasion¹⁴ in February 1982 Geiger had ordered some duct from Victor Valley, which was to be ready at a prescribed time. When he and other employees went to Victor Valley to pick up the duct, it was not ready. All that remained on some of the duct was to snap it together, and Geiger asked Jane, who was in the office, if he could start putting the duct together while employee Ralph Pyatt finished the fabrication that remained to be done. Jane talked with Pyatt, and told Geiger that his suggestion could be followed. After the duct was approximately three-fourths assembled, Larry Roney walked in and said he would appreciate it if Geiger and the others from Concord would get out.¹⁵

Geiger told Roney to talk with the people "up front," which Roney did. As Roney came back from the office the Concord employees were finishing the work and they left. They were in Victor Valley's shop for approximately half an hour. There is no evidence that Concord employees worked in Victor Valley's shop on any other occasion, and Geiger credibly testified that there was no other such occasion. 16

D. Respondent's View of the Relationship of Victor Valley and Concord

Adrian denied that Concord was organized in order to avoid Victor Valley's obligations to the Union. He testified that because all residential contractors in the business in the "Valley" other than Victor Valley were nonunion, and also because of declining business in general, he came to the conclusion in 1980 that Victor Valley, which was a union shop, no longer could compete in the residential and light commercial field. He decided to quit that field and concentrate on commercial and industrial business. He talked with John about his decision, and John wanted to go into business for himself since he preferred residential work. Adrian decided to close out all of Victor Valley's residential and light commercial work, and to assist John in getting himself established in a business. John generally corrorborated Adrian's testimony.

Geiger testified:

Well, the first remembrance I have of it is Adrian come by my house one evening and I don't recall what particular reason, but he told me that John was going to open up a shop and he might be interested in having me run it for him.

And so approximately a day or two later I went and talked to John about it and we discussed it and that was about it.

Geiger also testified that he first heard in 1981 that Victor Valley was going to quit the residential field, and that Adrian said he could not compete against nonunion shops in the high desert area.

E. The Union's Contentions

Gordon Jones, the Union's business manager, testified that he has worked with Victor Valley and Adrian for several years in his union capacity. He first heard of Concord in late December 1981 and early January 1982 when Victor Valley employees reported to him that they saw strangers loading equipment at the Victor Valley shop into Victor Valley trucks. He called Adrian on the telephone in February to protest what he assumed was a double-breasted operation. Adrian replied that there were problems in the industry in the upper desert, but that he did not want to comment further. In mid-February he met with Adrian and Donald Boyer, who was ex-

¹³ Adrian testified that Concord pays Victor Valley for work done by the latter for Concord in the normal course of business.

¹⁴ The facts set forth in this paragraph are based on the testimony of Geiger, who was a very credible witness. To the extent that the testimony of other witnesses differs from that of Geiger relative to this incident, Geiger's version is accepted as accurate.

¹⁸ The reason for the request was the fact that Concord is a nonunion shop whereas Victor Valley is union.

¹⁶ The fact that fabrication is unit work at Victor Valley is not in dispute.

Edward Stevens, one of Victor Valley's journeymen, testified that he has seen Concord employees on many occasions at Victor Valley's shop, but that they were loading material on Concord trucks, not working in the shop.

ecutive secretary of Inland Air Conditioning and Refrigeration Contractors' Association, the Employers' bargaining representative. Jones testified:

It was a general type conversation. I started off with words to the effect that I believed everyone knew why we were here, that it had come to my attention that there was a non-union entity known as Concord Mechanical, that it was my feeling that the owners of Concord Mechanical were one and the same as the ownership of Victor Valley, that the union could not allow this if in fact this were the case and that we should get some dialogue going to try and remedy the situation.

- Q. All right, can you recall Mr. DeZee saying anything?
- A. Towards the end of the conversation Mr. DeZee did state to both myself and G. Donald Boyer that he was a part owner of Concord Mechanical, did admit to its existence.
- Q. Did he say anything about whether or not he held an office in the corporation Concord?
 - A. He said he was vice-president.

At the end of the meeting Jones suggested that representatives of the Union and the Employers meet in an effort to work out a form of relief for employers in the upper desert, but that such relief would not extend into populous areas such as San Bernardino and Riverside. Adrian expressed an interest in the suggestion, but refused Jones' request that he discontinue the operation at Concord. Jones said he would thereafter consider the meeting as a first-step grievance, and he then invoked step 2, a joint adjustment board hearing. That hearing was held on March 11 or 12. During the course of the meeting Adrian said, inter alia, that he was vice president and RMO of Concord; that Victor Valley and Concord were "one and the same"; that Jane DeZee was financial secretary of both Companies; that he estimated jobs for both companies, that he spent his mornings at Victor Valley and his afternoons at Concord; that he owned 20 percent of Concord that "he found it necessary to establish the other company [Concord]" in order to bid residential work in competition with nonunion companies; that Concord did residential light commercial and commercial work and Victor Valley did heavy commercial and industrial work; and that Concord's board of directors consisted of Adrian, Jane, and John DeZee. On cross-examination, Jones stated that Adrian did not say the two Companies were "one and the same"; that such was only Jones' conclusion.

Adrian generally corroborated Jones' recitation concerning the meeting, but denied saying that he controlled both Companies and that he divided his time between the two Companies.

F. Concord's Hiring of Employees

Although, as noted *supra*, several employees hired by Concord formerly had worked for Victor Valley, only Boucher was hired by Concord upon leaving Victor Valley, and it is evident that his change of jobs was a normal change involving no factor of an *alter ego* ar-

rangement. Further, several former employees of Victor Valley came to work for Concord in positions that were different from those formerly held at Victor Valley. Employees Wayne King, David Heppler, John Brumett, and John Wilcox credibly testified that they were hired by Geiger, who ran Concord, and that they knew of no relationship between Concord and Victor Valley or of any participation by Adrian in the daily work of Concord. There is no evidence that Victor Valley supplied employees to Concord on any basis, and there is no evidence of interchange of employees between Victor Valley and Concord.

Discussion

There is little dispute concerning much that the General Counsel relies upon as proof that Victor Valley and Concord are "one and the same" company. It was Adrian's idea to set up John in the business that Victor Valley was going out of. It is apparent that, whether or not Concord was set up, Victor Valley no longer could remain in the residential field and would not do so. It could not sustain continued losses of the magnitude it was experiencing. Adrian suggested to John and Geiger that they go into business, which they did. John's business experience was quite limited, and he was only 20 years old when Concord was organized. Geiger was more mature than John and had more work experience. but he, too, had limited capability. Adrian helped the two young men get started, and taught Geiger how to estimate and bid jobs, but gradually withdrew that assistance. His total assistance, which was given without charge, was not great and did not involve direction of employees, business management, work at construction sites, or any of Concord's daily operations.¹⁷ Once business got underway, it was handled almost entirely by Geiger. There is no evidence that Adrian or Victor Valley profited in any way, other than through paternal pride, from Concord's existence. Neither received salary. dividends, or monetary or proprietary benefits from Concord's existence.

The law relating to alter ego status has been enunciated in several cases. It is clear that several factors must be present before an alter ego can be found, and that the basic indicia must be somewhat the same as indicia for finding a "single employer," i.e., interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control.¹⁸ However, more must be shown to establish that

¹⁷ One of the General Counsel's principal rebuttals to this statement is Jones' testimony, discussed supra. That testimony has been carefully considered and is given little weight because:

⁽a) It was apparent that Jones already had concluded that Victor Valley and Concord were "one and the same" regardless of anything Adrian may say. Clearly, Jones wanted to build a "double breast" case.

⁽b) Adrian credibly denied much of what Jones said or conducted.
(c) Whatever was said by the witnesses prior to trial was not under oath. Only trial testimony is considered, and findings herein are based on that testimony.

¹⁸ Sakrete of Northern California, 140 NLRB 765 (1963), enfd. 332 F.2d 902 (1964).

one organization is the *alter ego* of another, since the *alter ego* theory may be relied upon to bind one company, not signatory to an agreement, to the agreement of another company.¹⁹

At least one case²⁰ has referred to control of labor relations as "the most significant criteria for determining single employer status." So far as this record shows, Geiger alone hired, fired, established the working rules for, and directed the assignments of all of Concord's employees. Similarly, Adrian alone controlled all labor relations of Victor Valley's employees.

So far as this record shows, ownership and financial control of Concord is vested in John, who owns all the outstanding stock of the Company and who contributed all the capital for the business. 21 There is no evidence that John or Geiger has any financial interest in, or control over, Victor Valley. Jane's duties at both Victor Valley and Concord are routine and clerical—she does no more than sign checks and collect bills, and even those activities are performed during infrequent trips to the office. Adrian's attempt to have corporate records show a 20-percent interest and officer standing in him occurred after Concord already was organized, proved unsuccessful, later was officially disavowed, and was for the sole reason of qualifying Concord for a state license. This action by Adrian clearly was taken to assist his son's business. It was not taken to obtain any ownership or financial control of Concord, and no money or property changed hands—it was a paper transaction attempt. It is noted that the eventual qualifying license was that of employee Russell Wallace, the RME, who never had any financial interest, or officer status, in Concord. The facts that Adrian stated at an NLRB hearing, erroneously, that he had an interest in Concord and that he disassociated himself on state records after the charge herein was filed do not alter his real status and are immaterial.

As the Board and courts frequently have stated, possible common management is a factor that must be considered in allegations of alter ego relationships. There is no evidence of common management herein in the testimony of any witness. Throughout the record runs the theme that Geiger is the manager at Concord and Adrian is the manager at Victor Valley with neither assisting or interfering with the managerial efforts of the other. Only Geiger hires, fires, directs, assigns, and otherwise deals with the employees at Concord. John runs a few jobs he superintends, but Adrian is a stranger to Concord's rank-and-file employees or, at most, a nodding acquaintance.

There is no interrelation of the businesses, Victor Valley and Concord, within the law on this subject. The General Counsel points to Adrian's assistance to Geiger during Concord's early formation period, including occasional visits to Concord's office to assist and train Geiger, but that is much the same situation as in Shellmaker, supra, and is not conclusive of alter ego status. The General Counsel seeks an inference that Adrian

really ran the show at Concord, but the record does not support such an inference. All of the record points to Geiger as the only person who runs Concord. John clearly could not run the business, but Adrian did not step into John's shoes—that task was filled by Geiger. John, Benedict, Jane, Geiger, and Adrian and employees King, Heppler, Brumett, and Wilcox made it quite plain that only Gieger is the boss at Concord, and even the General Counsel's witnesses provided support for that conclusion. Certainly there is no evidence that John or Geiger had any business responsibility at Victor Valley or even participated in its management. The General Counsel points to the two matters described above wherein Concord did some work on two of Victor Valley's jobs and wherein Concord employees on one occasion spent approximately 30 minutes in Victor Valley's shop connecting some ducts and loading them onto Concord's trucks. Those two instances were brief, were of very limited monetary value, and clearly were isolated actions unrelated to the day-to-day management of either Victor Valley or Concord. The General Counsel also points to the lease of trucks to Concord by Victor Valley, but the record is clear that those leases, as well as the sale to Concord of office furniture and equipment, and the sale of fabricated materials to Concord by Victor Valley, were carried out, and paid for, in the normal course of business. Since Victor Valley quit the residential arena, it no longer needed all of the 15 trucks it had and therefore had excess equipment immediately available for lease. Insurance for the leased trucks is maintained as part of Victor Valley's fleet policy, but daily maintenance is provided by Concord at its own cost. The lease cost includes a profit markup for Victor Valley of 10 percent, which is a commonly used figure in the lease business. There is no evidence that lease and sales figures charged to Concord for any yard or office equipment, or for fabrication of job material, are less than the fair market value thereof. There is no evidence of the gratis transfer of any equipment or material, of "kickbacks" or rebates, or of sham transactions. There is no more than scant evidence of favoritism by Adrian toward Concord, but, even if there was blatant favoritism in day-to-day operations, that fact, standing alone, would not necessarily make Concord an alter ego of Victor Valley. The favoritism established herein falls far below that of the uncle toward the nephew exhibited in Shellmaker, supra.

In summary, the evidence shows that the reason for establishing Concord was not to create a benefit for Adrian or Victor Valley; nor was it to avoid the contract between Victor Valley and the Union. It was to enable John to go into business for himself and, it was hoped, to make a profit in a field that Victor Valley was abandoning. After Concord was established, it was operated as a separate entity almost entirely independent of Victor Valley. The instances wherein there was contact between the two corporations did not create, or show, their existence as a joint or single employer or as alter egos of each other. Rather, it showed the concern of Adrian that John be given a reasonable opportunity of becoming a successful businessman. In effect, the Gener-

¹⁹ Schultz Painting Co., 202 NLRB 111 (1973).

²⁰ Shellmaker, Inc., 265 NLRB 749 (1982).

²¹ John contributed \$4,500 initial capital, as discussed above. In *Shell-maker, supra*, the 20-year-old nephew of the alleged *alter ego's* principal owner only contributed \$900 to the business, yet received a loan of \$50,000 from the profit-sharing plan of the alleged *alter ego*; still, an *alter ego* status was not found.

al Counsel asks for an inference that the family relationships between the owners of Victor Valley and Concord warrant a finding that the two corporations are "one and the same." The record does not support that inference.²² Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged.

G. Larry Roney's Layoff

Roney testified that he worked for Victor Valley during different periods, commencing in 1977 as a sheet metal journeyman. Starting in mid-February 1982 he began working 1 week on and 1 week off instead of his regular 40-hour week. His supervisor was Gerrold Amack, Sr. On March 9, 1982, Adrian told him in the morning, with Stevens present, that he would have to take some time off because Victor Valley was out of money. Roney asked for his paycheck, and Adrian said he could pick it up on the Thursday following the next payday on Friday. Earlier, on February 26, he had complained to Amack that a nonunion man was assembling duct in the shop, and Amack said Pyatt had authorized it. Roney asked Pyatt about the incident, and Pyatt denied authorizing the assembly work. Roney described the incident and said that he had observed Geiger, John, and another Concord employee named Roger doing the work and had asked Geiger to tell Roger to leave because he was "a non-union man in a union shop." Geiger told him "to take it into the office," whereupon Roney talked with Amack. When he went out to the shop to talk with Pyatt the Concord employees still were there, but they left in about 5 minutes.

Stevens testified that approximately 1 or 2 weeks before Roney was terminated he talked with Amack:

We talked about the job I was working on for a few minutes and he brought up, he said to me that Mrs. DeZee was upset about something that had happened a week prior and that they were going to fire Larry.

Q. Did you say anything?

A. I asked him what the situation was because I wasn't aware of it and he told me that Larry had come in the shop and some of the Concord employees were putting some duct work together.

Q. Okay, and what happened?

A. That was the end of the conversation.

Stevens said he talked with Adrian a week or two later. At that time, according to Stevens, work was slow and employees were working alternate weeks. Stevens testified:

I asked Mr. DeZee if I was supposed to come in and work that next day or whether Larry was going to work and he said yes, for me to come in and that he was going to have Larry work the next day and he was going to have to have him take some time off because he was short on funds for payroll. The following day, Stevens testified, he overheard Adrian talking with Roney:

Mr. DeZee told Larry that after today he would have to take some time off because he was short on funds. And that was all I heard of the conversation.

Since Roney left, Stevens testified, he has worked "generally" 5 days each week, but with some days off. He said that no unit employees have been hired since Roney was laid off, and that two employees have left Victor Valley since then. On cross-examination, Stevens said that Amack was on vacation, or at least not in the shop, the day Roney was laid off, and that Pyatt²³ left Victor Valley after Roney was laid off. Stevens said that he worked alternate weeks for 1 or 2 months, and that the arrangement was set up in order that employees could draw unemployment pay for the weeks they were off. Work was slow, he said, and even Adrian was doing some rank-and-file work in the shop. He testified that no employee was hired to replace Roney.

Adrian corroborated Roney's testimony concerning their conversation when Roney was laid off and testified that Amack was on vacation when Roney was laid off. When Amack returned to work he, too, was laid off. Amack was a longtime employee of Victor Valley, and declined Adrian's offer of a demotion to journeyman rather than a layoff. The rotation system was instituted because of a work decline in the shop, after Amack talked about it with the employees, who agreed to that plan rather than a general layoff. Before Amack went on vacation he and Adrian discussed the rotation system:

We were trying to live with it for awhile but it was getting to the point that I was a little bit concerned and I discussed it with him and said if we had to lay off another man, who do you think we should lay off?

He thought for awhile and he says that he felt that Ed Stevens was probably a better inside and outside mechanic than what Larry Roney was.

Relative to the layoff, Adrian testified:

So he left to go on vacation and Ed was working his week but he wanted—he had some work that he needed some help on and he wanted Larry to come in.

So I believe they worked a couple of days and that day Jane was telling me that she didn't think she was going to meet the payroll that week. So I felt that Ed—we really couldn't—that Ed was just going to have to get by without additional help so I talked to Larry and asked him if he could take off for awhile.

We had another job in town where we were waiting on equipment and Larry had been running that job and I felt that we had possibly that we could pick up something that we could fill in with and then Larry could come back and work on that job because he knew about it, but we never did pick

²² Shellmaker, supra; Friederich Truck Service, 259 NLRB 1294 (1982).

²³ Pyatt was not a supervisor.

up any additional work and the work just more or less deteriorated a little bit below that and we never did rehire any more people.

Relative to Roney's check, Adrian testified:

Oh, when Larry—normally, when we asked somebody to take off I know by law we are required when we lay somebody off that you—are required to furnish them with their payroll check in a short period of time. Normally when we ask somebody to take off we don't know what period of time, maybe a couple of days, a week or what so we normally have them come back on a regular payday and have them pick up their check, or sometimes they will come back the following whenever they work again and pick up both checks.

When I asked him to take off he asked me for his check right away and I was a little bit shocked because I kind of sensed a little bit of hostility but I don't know—I was kind of surprised that he asked for his check.

Adrian testified that the first time he ever heard about the Roney-Geiger incident, discussed above, was when Jones asked him about it in March at the arbitration meeting.

Discussion

Amack, who made the alleged statement to Stevens concerning Roney's layoff, no longer is employed by Victor Valley and did not testify. Jane DeZee, who allegedly made a statement to Amack, did not testify.

The facts that work was slow and employees were working alternate weeks for that reason when Roney was laid off were testified to by Stevens and Adrian.

It is clear that the alternate workweek schedule was instituted in mid-February prior to Roney's alleged conversation with Amack on February 26 when the shop incident involving Geiger occurred. The record shows that the new schedule applied to all unit employees.

Adrian and Roney agreed that when he was laid off Roney was told that the reason was lack of funds.

There is no dispute about the fact that no employee was hired to take Roney's place. The fact that Stevens worked some extra days, but not full time every week, after Roney was laid off is not dispositive of any issue. Adrian credibly testified that Stevens was a better employee than Roney and Stevens still is employed by Victor Valley.

Roney worked under the union contract at Victor Valley and Jones knew of Roney's layoff, yet so far as the record shows no grievance was filed because of the layoff.²⁴

It is clear that Roney was laid off and not discharged. He was not given a paycheck on the day of his layoff.

If a violation of the Act were to be found, it could be based only on a single statement by Stevens. Stevens testified that Amack told him that Jane DeZee had told Amack "that they were going to fire Larry" because of the shop incident.

Jane DeZee did not participate in the day-to-day operations of Victor Valley. She came to the office on an infrequent basis to sign checks and she assisted in the collection of accounts receivable, but there is no evidence of her participation in the running of Victor Valley. Nor is there any evidence that she participated in hiring and firing employees. She was available to be called as a witness on behalf of Victor Valley and was not called, but the statement in the testimony about Roney was not alleged to have been made by her—it was alleged to have been made by Amack. Thus, no inference is drawn from her failure to testify.

So far as the record shows, Adrian was not a participant in the incident in either the shop or the office the day Concord's employees were at the shop, and there is no contention that he, who ran Victor Valley, said anything to anyone other than Roney about laying off Roney.

As previously noted, Amack was not called as a witness, and there is no explanation as to why he was not called, but he no longer works for Respondent.

There is left for the record only a statement by Stevens, who was Roney's fellow employee, that Amack told him that Amack was told by Jane DeZee that Roney was going to be laid off because of an incident that occurred in the shop involving Concord's employees. In view of Adrian's testimony concerning the reason for Roney's layoff, the poor condition of Victor Valley's business at the time, the fact that Roney was not replaced, and the fact that no previously laid-off employees, including Amack, were recalled to work, the evidence is not preponderant that Roney was laid off in violation of the Act. Stevens' statement, standing alone, involved hearsay two layers deep. While that statement was attributed to two supervisors or agents and thus was admissible, that fact does not relieve the statement of its hearsay quality. The case for legitimate layoff is just as strong as the case for improper layoff, and the latter depends entirely upon hearsay testimony twice removed. Therefore, Stevens' testimony on this issue is not credited, and it is found that the General Counsel did not show by a preponderance of the evidence that Roney was laid off in violation of the Act.

H. The Alleged 8(a)(1) Statement

Paragraph 10 of the complaint alleges that the statement of Jane DeZee, as related to Amack as related to Stevens, concerning Roney was a violation of Section 8(a)(1) of the Act.

For the reasons set forth in section G, above, no violation is found.

CONCLUSIONS OF LAW

1. Victor Valley Heating and Air Conditioning and Concord Mechanical, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

²⁴ No finding or inference is based on this fact.

2. Respondents did not violate Section 8(a)(1), (3), or (5) of the Act as alleged.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER²⁵

The complaint is dismissed in its entirety.

in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided